



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

June 26, 2013

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Carol Greene**
Tax Registry No. 911268
Transit Bureau District 33
Disciplinary Case No. 2011-3650

Police Officer Elix Hernandez
Tax Registry No. 936752
Transit Bureau District 33
Disciplinary Case No. 2011-3651

GHAN

The above named member of the service appeared before Assistant Deputy Commissioner David S. Weisel on February 12 and 13, 2013 and was charged with the following:

DISCIPLINARY CASE NO. 2011-3650 POLICE OFFICER CAROL GREENE

1. Said Police Officer Carol Greene, assigned to Transit Bureau District 33, on or about December 17, 2010, while on duty, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Officer attempted to prevent Captain Ahmad Alli from gaining entry into the crew room.

P.G. 203-10, Page 1, Paragraph 5

**PUBLIC CONTACT- PROHIBITED
CONDUCT**

2. Said Police Officer Carol Greene, assigned as indicated above, on or about December 17, 2010, while on duty, was absent from her post without permission or police necessity.

P.G. 203-05, Page 1, Paragraph 2

P.G. 202-21, Page 1, Paragraph 20

**PERFORMANCE ON DUTY
POLICE OFFICER – DUTIES AND
RESPONSIBILITIES**

3. Said Police Officer Carol Greene, assigned as indicated above, on or about December 17, 2010, while on duty, failed to ring the desk officer as required.

P.G. 202-23, Page 1, Paragraph 6

RADIO MOTOR PATROL RECORDER

4. Said Police Officer Carol Greene, assigned as indicated above, on or about December 17, 2010, while on duty, failed to make entries in her Department issued memo book as required.

P.G. 212 08, Page 1, Paragraph 1

ACTIVITY LOGS

DISCIPLINARY CASE NO. 2011-3650**POLICE OFFICER CAROL GREENE**

5. Said Police Officer Carol Greene, assigned as indicated above, on or about January 20, 2011, did wrongfully and without just cause prevent or interfere with an official Department investigation by making false and/or misleading statements, to wit: said Police Officer, during an official Department interview stated that Captain Ahmad Alli gained entry into the crew room after the door to the crew room was unlocked, knowing that said statements was not, in fact, true.

P.G. 203-10, Page 1, Paragraph 5

**PUBLIC CONTACT – PROHIBITED
CONDUCT**

DISCIPLINARY CASE NO. 2011-3651 POLICE OFFICER ELIX HERNANDEZ

1. Said Police Officer Elix Hernandez, assigned to Transit Bureau District 33, on or about December 17, 2010, while on-duty, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Officer attempted to prevent Captain Ahmad Alli from gaining entry into the crew room.

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P.G. 203-05, Page 1, Paragraph 2

P.G. 202-21, Page 1, Paragraph 20

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POLICE OFFICER – DUTIES AND
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P.G. 202-23, Page 1, Paragraph 6

RADIO MOTOR PATROL RECORDER

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P.G. 212-08, Page 1, Paragraph 1

ACTIVITY LOGS

DISCIPLINARY CASE NO. 2011-3651 POLICE OFFICER ELIX HERNANDEZ

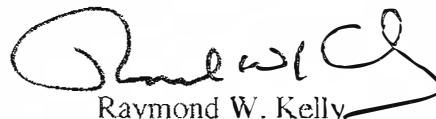
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P.G. 203-10, Page 1, Paragraph 5

**PUBLIC CONTACT – PROHIBITED
CONDUCT**

In a Memorandum dated May 20, 2013, Assistant Deputy Commissioner David S. Weisel found Police Officer Carol Greene, Not Guilty of Specification Nos. 1 and 5, and Guilty of Specification Nos. 2, 3 and 4 in Disciplinary Case No. 2011-3650. Also, Police Officer Elix Hernandez was found Not Guilty of Specification Nos. 1 and 5, and Guilty of Specification Nos. 2, 3 and 4 in Disciplinary Case No. 2011-3651. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

Police Officer Greene and Police Officer Hernandez shall each forfeit twenty (20) vacation days, as a disciplinary penalty.



Raymond W. Kelly
Police Commissioner



POLICE DEPARTMENT

May 20, 2013

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Carol Greene
Tax Registry No. 911268
Transit Bureau District 33
Disciplinary Case No. 2011-3650

Police Officer Elix Hernandez
Tax Registry No. 936752
Transit Bureau District 33
Disciplinary Case No. 2011-3651

The above-named members of the Department appeared before the Court on February 12 and 13, 2013, charged with the following:

Disciplinary Case No. 2011-3650

1. Said Police Officer Carol Greene, assigned to Transit Bureau District 33, on or about December 17, 2010, while on-duty, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Officer attempted to prevent Captain Ahmad Alli from gaining entry into the crew room.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT PROHIBITED CONDUCT

2. Said Police Officer Carol Greene, assigned as indicated above, on or about December 17, 2010, while on-duty, was absent from her post without permission or police necessity.

P.G. 203 05, Page 1, Paragraph 2 PERFORMANCE ON DUTY

P.G. 202-21, Page 1, Paragraph 20 – POLICE OFFICER
DUTIES & RESPONSIBILITIES

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P.G. 202-23, Page 1, Paragraph 6 – RADIO MOTOR PATROL RECORDER

4. Said Police Officer Carol Greene, assigned as indicated above, on or about December 17, 2010, while on duty, failed to make entries in her Department issued memobook as required.

P.G. 212-08, Page 1, Paragraph 1 – ACTIVITY LOGS

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P.G. 203 10, Page 1, Paragraph 5 PUBLIC CONTACT PROHIBITED CONDUCT

Disciplinary Case No. 2011-3651

1. Said Police [Officer] Elix Hernandez, assigned to Transit Bureau District 33, on or about December 17, 2010, while on-duty, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Officer attempted to prevent Captain Ahmad Alli from gaining entry into the crew room.

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P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

The Department was represented by Vivian Joo, Esq., Department Advocate's Office. Respondent Greene was represented by Kenneth E. Ramseur, Esq. Respondent Hernandez was represented by John P. Tynan, Esq., Worth, Longworth & London LLP.

Respondents, through their counsel, entered a plea of Not Guilty to Specification Nos. 1 and 5. They pleaded Guilty to Specification Nos. 2-4 and testified in mitigation of the penalty. A stenographic transcript of the trial-mitigation record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondents, having pleaded Guilty to Specification Nos. 2-4, are found Guilty. They are found Not Guilty of Specification Nos. 1 and 5.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Captain Ahmad Alli and Captain Peter Rose as witnesses.

Captain Ahmad Alli

Alli, assigned to the Communications Section, previously was the executive officer of Transit District (TD) 33. On Friday, December 17, 2010, at approximately 0515 hours, he visited the Van Siclen Avenue subway station on the A/C routes. This was a fixed post due to conditions like robberies and grand larcenies. Police Officer Steve Castillo was assigned to the post, and Alli went there to ensure he was present and accounted for. Respondents were assigned to patrol the trains and stations between and including the Kingston-Throop Avenues and Grant Avenue stations. Van Siclen Avenue was one of these stations.

When Alli arrived at the station, he did not see Castillo. He searched the mezzanine and both platforms. After about 10 minutes, Alli raised Castillo on the radio and asked where he was. Castillo said that he was at the Van Siclen station. Alli assumed that he was in a room and told him to come to the mezzanine.

It took about two minutes for Castillo to appear. Alli witnessed him come out of a corridor that led to a "crew room." This was a Metropolitan Transportation Authority (MTA) room. It was not an authorized meal location for Department members.

After signing Castillo's Activity Log, Alli asked him if anyone else was in the room with him. Castillo said no, but Alli wanted to check. As they walked to the crew room, Castillo cautioned that the door sometimes got stuck. Alli responded, "[W]ell, you just came out of it so it shouldn't be stuck." Alli told him to open the door. Castillo pushed the door, but said that it occasionally "locks by itself." Alli reiterated that because he had just come out of it and "you have the key," he should be able to open it.

Alli told Castillo to step aside and tried himself. Before doing so, he said, "[T]his is Captain Alli, open the door or I'll give everyone charges." He pushed the door open about an

inch and felt resistance, like someone was pushing back. He issued the warning again and pushed harder. The door widened to two or three inches, and Alli observed a black shoe behind it. "[T]o me it appeared someone was behind that door" because there was resistance. Alli threatened to contact the Emergency Service Unit (ESU) and have them take down the door. He also said that anyone in the room was going to be suspended.

After a couple of seconds, "I tried" and the door opened. Alli entered and observed Respondents about two feet from the door. When he asked "why didn't this door open," Respondents answered that "it must have been stuck, sometimes it locks by itself." Respondents' uniform jackets were off, but their protective vests were on.

Alli observed that there was a "dead bolt" on the door, but it "did not line up. It wasn't capable of locking." The door itself was "free" and "operational," but he could not lock the door from the inside because the bolt did not work.

Alli inspected Respondents' Activity Logs and found that neither had written anything about their presence in the crew room. Alli determined that Respondents were off post. He signed their books, wrote a note there about Respondent's presence in the crew room without log entries, and ordered them to take their posts (see Department's Exhibit [DX] 4, Respondent Greene's Activity Log; DX 5, Respondent Hernandez's Activity Log).

On cross-examination, Alli stated that his purpose for going to the station was to check on Castillo, to make sure he was okay and that he was doing his job.

Alli walked the two side platforms, even though he could see one while standing on the other, and checked two rooms, before raising Castillo over the radio. It took him ten minutes to check the platforms as well as the mezzanine, where the token booth was located. The entire

mezzanine was visible from in front of the token booth. Alli agreed that the station was “pretty empty” at 0500 hours.

Alli explained that the entire station was considered the fixed post. Every situation was different, however. At Van Siclen Avenue, the condition crimes were occurring on the platforms and trains. The posted officers were directed to the platforms and mezzanine.

Alli admitted that he did not radio Castillo as soon as he got to the station. He explained, “I usually look for them to make sure they’re doing what they’re supposed to do. If I radio them and they’re hiding out, that defeats the purpose.”

About two minutes prior to raising Castillo over the radio, Alli realized that he was probably hiding out in a room. There were eight to nine rooms in the mezzanine area, which was about 60 feet wide. Alli checked a couple of these rooms but not all of them, because “there’s doors leading to other doors. I wasn’t going to go looking in through all doors.” Alli “looked for him, I went a couple of doors, I figured he was in one of several doors. . . . I didn’t want to look any more. There’s rats down there, I’m by myself, I figured I’d have him come out to me.” Upon raising him over the radio, Alli saw Castillo exit a room on the mezzanine, about 30 to 40 feet from the token booth. This was not one of the rooms he had checked.

Alli believed that Castillo was lying to him when he said no one else was in the room. When Alli told Castillo to open the door, it looked like Castillo “was trying but not giving a lot of effort. It appeared that he was acting, like pretending to open the door, pretending to push the door.” The door did not move forward when Castillo was pushing. Castillo’s conduct constituted insubordination, for which Castillo received a command discipline (CD). Respondents were offered CDs as well.

Alli stated that although Castillo was beside him when Alli tried to open the door, he did not ask Castillo to help him open it because he thought Castillo was "in cahoots" with whoever was pushing back. It took too long for Castillo to come out of the crew room for there not to be malfeasance.

Alli put a lot of effort into opening the door, including the use of his shoulder. He knew that there was someone pushing back because "it slammed . . . once I released, it closed really quickly." Alli did not ask Castillo who was in the room because he had already lied. It was less than five minutes from the time Alli asked Castillo if anybody was in the room to when Alli realized Castillo had lied.

Before starting to push on the door, Alli acknowledged that he did not announce his presence. While attempting to open the door, Alli saw someone's foot behind the door, but not pushing on it. The door finally opened due to Alli opening it and not by someone inside opening it for him. On the third attempt opening the door, it opened easily.

When Alli threatened to call ESU, his intention was not necessarily to have ESU take the door down, but to scare whomever was in there into opening the door. Alli believed that there were Department members on the other side of the door.

Upon gaining entry into the room, Alli asked Respondent Greene if she heard him on the other side of the door and she responded that she did not. He did not ask her why she was in the room because the officers were not supposed to be there.

Alli agreed that the crew room served as a locker room. There were lockers there for MTA personnel. There were no windows.

The door in question was metal. That was the only door. There was no keyhole on the door, only the bolt. When asked if the bolt was "rusted and somewhat corroded," Alli first

answered, "Possibly," then added, "I don't remember if it was rusted or corroded." He did not examine the hinges of the door or ascertain whether the door was sagging.

After observing the bolt, Alli "closed the door and tried to close it, it doesn't even line up to the hole that the lock would slide into." Alli asked Respondent Greene how the door could lock by itself, as "this door doesn't even lock." Respondent Greene told him, "[T]he door locks by itself, sometimes it locks by itself and the door may have been stuck." When Alli opened and closed the door, "it opened and closed freely."

There was a doorknob or handle on the door below the lock. Alli admitted that in the past, he had encountered situations where he had to raise a door a little bit to slide a bolt across. At no point while checking the door here, however, did he do so. The bolt was far from the hole and it appeared it had not worked for a long time.

Upon examining Respondents' Exhibit (RX) A, Alli acknowledged that the photograph showed a bolt slid all the way in a locked position. This "could be" the same lock that he examined on the day of the incident. But a lot of transit doors had similar locks and it could be any transit door.

Alli asserted that Respondents tried to bar him from the room because they were off post and there without permission. Alli agreed, however, that there was no way for Respondent Greene to leave the room as long as he was outside the door. It was only a matter of time before Alli gained entry.

Captain Peter Rose

Rose previously was assigned as the integrity control officer (ICO) in TD 33. On December 17, 2010, he was assigned an investigation involving Respondents. He was a lieutenant at the time.

Respondents were assigned as partners to work a 2315x0750 tour, ending on December 17, 2010. In addition to patrolling the trains and platforms from Kingston-Throop to Grant, they were directed to perform train patrol from Broadway Junction (East New York) to Grant at 2400 hours, a directed patrol at Grant at 0030 hours, and a transit automated sweep, or TAMS, at Euclid Avenue at 0130 hours. TAMS was where a sergeant and a number of other officers stationed themselves on a train platform and announced their presence as trains came in. Respondents were assigned to be meal relief for Castillo at 0230, and were assigned their own meal at 0400. Meal lasted one hour (see DX 1, roll call).

Rose testified that members of the service were authorized to take meal at a Department facility, a Department vehicle, or a "bona fide restaurant." The MTA crew room at issue here was not authorized for meal and was considered a cooping-prone location.

Rose conducted official Department interviews of both Respondents as part of his investigation (see DX 2, Respondent Greene transcript; DX 3, Respondent Hernandez transcript). Respondent Hernandez informed Rose that due to the infrequency of the trains, they were in the crew room taking their meal while they waited for the trains to come. Respondent Hernandez indicated that while he was inside the crew room, he heard Alli, followed by banging on the door.

Respondent Greene stated to Rose that she heard some sounds coming from outside of the crew room but did not realize it was Alli, and that she was trying to unlock the door to let the

person in. Rose claimed that Respondent Greene said that when Alli came into the room, he threatened to have ESU take the door off the hinges.

Both Respondents indicated that the door to the crew room was locked and that they were trying “actively” to unlock the door.

Rose and TD 33’s commanding officer, Captain Henry Sautner, went to the Van Sicken Avenue station at approximately 1000 hours on December 17, 2010, and visited the crew room. Before entering the crew room, there was a gated area, which was unlocked. The crew room was adjacent to the porter room, which stored cleaning supplies.

Rose entered the crew room, closed the door behind him, and observed a slide bolt on the door. Rose slid the lock to close it, but when Sautner pushed on the door, the door immediately opened. The slide bolt never engaged the lock, and there was no indication that the lock had worked in some period of time, as there were no paint chips where the bolt would slide in. Rose determined that there was no way of locking the door of the crew room.

Both Respondents told Rose that they were trying “actively” to unlock the door.

Rose testified that officers were required to make an Activity Log entry at the start and end of meal. Officers working the midnight tour were required to make a telephone call to, or “ring,” the desk officer once an hour between 0200 and 0700 hours, for accountability and safety purposes. The rings were recorded in a log maintained at the desk. On December 17, 2010, Respondents were assigned to ring the desk at 40 minutes past the hour. Rose reviewed the ring log (DX 6) and found that there were no log entries associated with Respondents. During their interviews, Respondents admitted that they never called the desk. Rose also reviewed Respondents’ Activity Logs. No entries concerning the ring or meal were made.

Based on Rose's interviews with Respondents and Alli, Rose determined that Respondents were off post from approximately 0400 hours to 0515 hours. This was because Respondents said that they entered the crew room around 0400, and Alli arrived at the station around 0515. Respondents' meal was off post because they were having it in an unauthorized location; between 0500 and 0515, Respondents should have been back on patrol, on their post.

On cross examination, Rose testified that TD 33's area of patrol covered 42 train stations in Brooklyn and Ridgewood, Queens. The command headquarters was at Broadway Junction.

Rose agreed that at the Van Siclen Avenue station, there was no facility for an officer to take a meal. Rose was not aware of any diners, fast food restaurants, bodegas or delis open at 0400 in the Van Siclen area.

Rose claimed not to know the criminal conditions of the surrounding area or if it was the Brownsville neighborhood. Respondents were in uniform and were not assigned to a patrol vehicle. Rose had walked in that neighborhood at 0400 or 0500 hours in wintertime, in uniform, as both a lieutenant and a captain. He expected an officer working even "in the worst neighborhood in the city" to do so, as they were trained, equipped and paid to do so.

Rose knew of only two dining locations in the immediate vicinity off the top of his head: one would be TD 33 headquarters at Broadway Junction, three subway stops away from Van Siclen. Rose agreed that during the early morning hours of December 17, 2010, the A or C train would run approximately once every 40 minutes. Rose estimated that if Respondents wanted to take their meal at the command, and were leaving from Van Siclen, and caught the train serendipitously, they could be there in 7 to 10 minutes. If they missed the train, it would take them 40 minutes longer. Rose noted that Respondents did not have to return to Van Siclen after their meal. Because they were assigned to cover the stations between Kingston-Throop and

Grant Avenues, if they had their meal at the command, they could have left the Department facility, “walked downstairs to the southbound or northbound Adam and Charlie platform,” and would have been on post.

Alli reported the incident to Rose face-to-face on December 17, 2010, as they shared an office. Alli instructed Rose to conduct the investigation.

The crew room was not locked when Rose and Sautner arrived there. They knocked and walked inside. The room was empty. Rose observed a table, two chairs, a bench fixed to the floor and metal lockers against a back wall. The metal slide bolt was the only lock on the inside of the door. The door appeared to be of standard size, about seven feet tall by three feet wide. It was hefty. Rose did not examine the hinges of the door and did not recall if the door squeaked when opened. Rose did not recall if there was a way to lock the door from the outside. The lock that was present was only functional if someone engaged it from inside the room.

Rose was shown RX A and B. RX B was a photograph of a door hinge. Rose admitted that both looked similar to the door of the crew room. RX H appeared to depict the external gate leading to the crew room.

Rose did not take any photographs of the lock in question because, he claimed, it was MTA property and the crew room was a private room there. Alli and Sautner told him that they did not know if they had permission to take photographs. Rose acknowledged that he and Sautner went into the room and tested the lock without getting any permission to do so. He did not recall if there were any names on the lockers.

During his official Department interview, Respondent Hernandez stated that he never prevented Alli from coming into the room. Once Respondent Hernandez was able to unlock the door, Alli was able to enter.

On re-direct examination, Rose stated that while RX A showed paint chips, there were no chips on the door on December 17, 2010. The bolt part of the lock did not engage with the latch; it appeared to be too short, rather than being too high or too low.

Respondents' Case

Respondents both testified on their own behalf.

Respondent Greene

Respondent Greene, a 20-and-a-half-year member of the Department, had been assigned to TD 33 since March 2004. Respondent Greene asserted that she took her meal on December 17, 2010, in the crew room because there was nowhere else to go in the area. All eating establishments were closed at that time of night. Respondent Greene agreed that the neighborhood around the Van Siclen Avenue stop was a high crime area. It was not the kind of area that she would choose to walk in after dark, as the streets were poorly lit and isolated, and there were gangs. Given the train schedule at that time of day, it would have taken 30 to 35 minutes to get to Broadway Junction.

Respondent Greene admitted that she was absent from her post because she was taking meal in the crew room. She also failed to ring the command. She claimed that had she done so at 0400 hours, she would not have been considered off post.

Although it would have been possible for Respondent Greene to leave the station to take her meal, by taking her meal inside the crew room she remained inside the station that she was responsible for guarding. She could have been notified by radio had something happened at the

station. It would have taken a minute or two for her to get from the crew room to the token booth.

Respondent Greene did not make Activity Log entries because she forgot. She was looking for activity. When she commenced her tour that day, she assisted Castillo while he wrote a summons.

Respondent Greene entered the crew room by herself. Respondent Hernandez was already there. Respondent Hernandez locked the door at first. When asked, however, "Why did you lock the door?" Respondent Greene said, "Creature of habit. Lock on the door; you lock the door." It was not done to exclude supervisors.

The crew room had no door other than the one that Respondent Greene used to enter. She was dressed in full uniform while she took meal in the room. She did not take her jacket off because it was so cold.

The door was locked from approximately 0415 until 0515 hours. Between 0500 and 0509 hours, Castillo was in the room with Respondents. Castillo left the room after he stated that someone was raising him on the radio. Respondent next saw Castillo approximately five minutes later with Alli. Although Respondent Greene heard a bang on the door, she did not know that it was Alli until she opened the door. To open it, she had to slide the lock from the locked position. It was difficult for her to slide the lock back, and the process took approximately a minute. She did it by "holding the handle, lifting it and juggling with it and pulling it back." The handle was shaped like a C and attached to the door. She had to use a lot of strength, and Respondent Hernandez had to help her. Respondent Greene maintained that she was telling the truth when she stated during her official Department interview that Alli entered the crew room after the door was unlocked.

Alli was mistaken when he stated that Respondents pushed against him on the door. When the door was locked, there was enough give to feel like someone was holding it. This was because the door was sagging on its hinges and hung a little crookedly.

Respondent Greene testified that she took the RX A-H photographs at approximately 0525 hours on December 17, 2010. RX A demonstrated a functional door bolt slide lock. The lock contained chipped paint and rust. She took the picture because Alli accused Respondents of holding the door. Respondent Greene testified that neither she nor Respondent Hernandez held the door.

RX B showed the door hinges, which Respondent Greene described as old and worn, with chipped paint. RX C showed the bolt lock with chipped paint and the hole in the wall where the bolt would slide into.

RX D showed the gate that had to be passed through to enter the room. The gate was already open on the day of the incident, but Respondent Greene had the key to the gate and had used it on 15 to 30 previous occasions. The key was issued to her by the Department to unlock areas when taking police action. RX H was another photograph of the gate.

RX F showed the top of the door to the crew room. RX E showed a door hinge. RX G showed another hinge that had loose screws. The door was six to seven feet tall and two to three inches thick.

On cross examination, Respondent Greene stated that she arrived at the crew room a little after 0400 hours. She had to knock, and Respondent Hernandez opened the door for her. Because there was nowhere to purchase food, she did not eat while in the room.

Respondent Greene admitted that after Castillo was raised on the radio, and exited the room, Respondent Hernandez locked the door behind him so that nobody could come in. After

Alli entered the room, he told Respondents, "You opened the door just in time because if you hadn't, I would have called ESU to remove the door."

Respondent Greene admitted that she did not take any pictures of the door in its entirety.

Upon questioning by the Court, Respondent Greene stated that they performed meal relief for Castillo until 0340 hours because his meal was extended. After that, they continued to patrol at Van Siclen. She did not start meal exactly at 0400 hours because she and Respondent Hernandez were looking for activity and lost track of time.

There was no toilet in the crew room area, notwithstanding that based on RX H, which showed a "Men" sign outside the gate, there might have been one at one time.

While Respondent Greene was opening the door for Alli, she said, "I'm trying to get it open. It's stuck." She did not know who was on the other side of the door and believed it was a transit worker.

Respondent Hernandez

Respondent Hernandez, an eight-year member of the Department, was assigned to TD 33. On December 17, 2010, he and Respondent Greene arrived at the Van Siclen Avenue subway station at approximately 0230 hours. They watched as Castillo issued a summons on the platform and then relieved him during his meal break. Castillo finished his meal at 0340 hours. Respondent Hernandez wanted to take his meal at the command but decided to take it at the station instead because he was "doing activity and waiting for the train." He claimed, however, that given the train schedule at that time of day, there was no reasonable way they could have gone to the command or any other station for meal and gotten "back to post" in time.

Respondent Hernandez had a Department-issued key that could be used to access locked rooms within the transit system. The crew room was unlocked when he entered, but he locked the door behind him. Respondent Greene was in the room with him.

Respondent Hernandez admitted that he forgot to ring the command between 0400 and 0500 hours. He also forgot to update his Activity Log. At approximately 0500 hours, Castillo entered the room to warm up. To allow Castillo entry, Respondent Hernandez needed to unlock the door. There was some difficulty, as the latch was sticking. He explained, "Sometimes I had to use the right hand to take the C-handle and use my left hand to pull the knob of the dead bolt or the other way." He also had to push the door up "to see that the dead bolt lock come out to the back. Sometimes it's harder because you[r] hands, they feel cold. Your fingers cannot grab it as well."

Shortly after Castillo came in, Respondents heard banging at the door. Respondent Hernandez heard a voice on the other side of the door and believed initially that it was Castillo wanting to come inside again. Alli identified himself from the other side of the door, but Respondent Hernandez could not recall anything specific that Alli said while on the other side of the door. He contended that Alli was speaking in a low tone of voice. Neither Respondent intentionally prevented Alli from entering the room.

Respondents opened the door, but it took a few minutes due to the stickiness of the lock. It took the effort of both Respondents to get the door open. Alli and Castillo were standing on the other side.

On cross examination, Respondent Hernandez testified that he originally planned to return to the command for meal and get food from the vending machines. He changed his mind because the wait for the train was too long.

Respondent Hernandez had his jacket on at the time that Alli entered the crew room because it was cold.

FINDINGS AND ANALYSIS

Specification Nos. 1 & 5

Respondents are charged with attempting to prevent a captain from entering a room in which they were situated while off post. Respondents were assigned to Transit District 33. On December 17, 2010, they were working the first platoon and were assigned to patrol the stations and trains along the Fulton Street Line (the A/C services) between and including the Kingston Throop Avenues and Grant Avenue Stations. Their meal period was designated at roll call as 0400 hours. At 0230, they also were assigned as meal relief for Police Officer Castillo, who was assigned to a fixed post at the Van Siclen Avenue Station. This was extended to 0340 because Castillo had a summons to deal with, so his meal period was changed to 0240 0340.

Respondents arrived at Van Siclen Avenue. They asserted that they performed the meal relief for Castillo, and a sergeant signed their Activity Logs at 0235 hours. They had no activity listed after that until visited by Captain Alli, the platoon commander.

Alli testified that he came to the Van Siclen station around 0500 hours but did not see Castillo, even after searching the station rigorously. He radioed Castillo and saw him come out of the area of the "crew room." This was described as a room inside the station complex where MTA employees could leave their personal property or take breaks. There was no toilet there, however, and the crew room was not an authorized meal area for Department members. Such rooms within subway stations, hidden from the general public, are cooping-prone locations.

Alli instructed Castillo to take him to the room so he could see if anyone else was in there. When Castillo reached the door, Alli felt that he was making a half-hearted effort to push the door open. Castillo asserted that the door had a habit of sticking. There was no door knob, only a C-shaped handle, on the outside.

Alli tried the door himself and felt resistance. He ordered whoever was inside to open the door or else they would be suspended from duty. He pushed again and still felt resistance. He also saw a foot at the bottom of the door. When he warned whoever was inside that he would have ESU take down the door, the door opened. Alli observed that Respondents were in the room.

At trial, Respondents admitted that they were off post by being in the crew room. They also admitted that they failed to make entries in their Activity Logs about being off post, and to ring the desk officer at the designated hour, as officers on the first platoon are required to do. They asserted, however, that they were not trying to keep the door to the crew room closed to prevent Alli from entering. They stated that the door had a sliding latch lock attached to it by screws, and the door frame had a hole for the latch. Because of age, wear and tear, multiple paint jobs and the like, however, the latch no longer went into the lock neatly. To unlatch the door, Respondents had to pull at it vigorously before it would budge.

Respondents conceded that they not only were in the room improperly but locked it behind them. They did not want anyone to find them there, notwithstanding Respondent Greene's testimony that it was merely customary for people to lock doors behind them. Nevertheless, Respondents testified that when Alli demanded they open the door, they genuinely attempted to open it. The reason Alli felt resistance and saw people at the door was that they were trying to unlatch the lock, but it was sticking.

Both sides, for the most part, presented facially credible accounts. Therefore, an examination of the objective evidence is the most crucial step in this case.

The photographic evidence, which Respondent Greene said she gathered right after Alli accused Respondents of barring him from the room, supports their claim that there was significant wear and tear to the door, requiring effort to latch it. RX A and C showed a rusted latch with chipped paint everywhere around it. On the other end, RX G showed the door coming off one of the hinges. At least one screw was loose and the door was sliding away from the hinge. RX B showed that many layers of paint had been caked onto the door. Rose, the ICO, maintained that there was no chipped paint, yet admitted that RX A was consistent with what he saw during his investigation. Alli also admitted that the latch might have been corroded. Rose took no photographs of his own, inexplicably claiming that while there was no problem being in the room and manually testing the door, the “private” nature of the room made it legally problematic to photograph there.

Thus, the evidence suggests that the door did have a habit of sticking. If Respondents were having difficulty getting it unlatched, Alli might have interpreted this as someone trying to bar or block it from behind.

Rose testified that he tested the door and it did not stick. He specifically tried to see if the door would open while the latch was all the way to the left, not toward the hole at all. It opened easily with no resistance. Respondents, however, testified that the door stuck when the latch was in the hole. They did not say that the door itself was unable to be opened if the latch was not also locked. Rose’s testimony about the door in this regard is irrelevant.

Respondents further argued that there was no rational reason for them to bar Alli’s entry. While they must have been embarrassed at being caught in the crew room, knowing that they

were cooping, Alli was going to find them there eventually no matter what. There was no other means of egress from the crew room other than the door in question. Furthermore, there is no evidence that Respondents were trying to hide anything in the room.

As such, the Department failed to prove, by a preponderance of the evidence, that Respondents intentionally tried to prevent Alli from entering the crew room. They thus are found Not Guilty of Specification No. 1.

In Specification No. 5, Respondents are charged with interfering with the Department investigation into the incident by stating during their official interviews, falsely or misleadingly, that Alli gained entry into the crew room after the door to the crew room was unlocked. In fact, the evidence supports Respondents' assertion that that is exactly what took place. The door was locked, Alli tried to open it, Respondents tried to unlock it, they succeeded, and Alli opened it. Because Respondents made no false or misleading statement in this regard, they are found Not Guilty of the fifth specification as well.

Specification Nos. 2-4

Having pleaded Guilty to Specification Nos. 2-4, Respondents are found Guilty.

PENALTY

In order to determine an appropriate penalty, Respondents' service records were examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). Respondent Greene was appointed to the Department on June 30, 1992. Respondent Hernandez was appointed on January 10, 2005. Information from their personnel files that was considered in making this penalty recommendation is contained in attached confidential memoranda.

Respondents have been found Guilty of being off post, failing to ring the desk, and failing to maintain their Activity Logs. They admitted that on December 17, 2010, although their meal period was supposed to be from 0400 to 0500 hours, they not only extended that period by 15 minutes but also took their meal in an unauthorized location, an MTA crew room in the Van Siclen Avenue subway station. This was a cooping-prone location, and that is pretty much what they were doing there.

Respondents contended that they took their meal in the Van Siclen crew room only because there were no open bona fide restaurants nearby at that time of night. This presupposes that they had to be at Van Siclen at 0400 hours. Their meal relief for Castillo at the Van Siclen fixed post ended at 0340. Respondents, however, were assigned to patrol anywhere along the A/C trains and platforms between and including the Kingston Throop Avenues and Grant Avenue Stations. One of these was the Broadway Junction Station, where TD 33 headquarters was located. Assuming arguendo Respondents' implicit contention that there were no open bona fide restaurants within walking distance of any of the covered stations at 0400 hours – it was undisputed that there was food available at TD 33. Even if it took 40 minutes for a train to arrive at Van Siclen at that time of night, as Respondents contended, they could have taken a train at 0420 hours to Broadway Junction, two stations away. This would have given them at least 30 minutes to eat. As Rose noted, the moment that they walked out of the command onto the A/C platforms at 0500 hours, they would have been back on post.

In sum, the Department has taken on the responsibility of offering uniformed members one hour, if available, for meal. But it is the members' responsibility to feed themselves and they would have been able to do so, with forethought and planning, in an authorized manner in this case. So the Court rejects their mitigation testimony.

Respondents essentially have been found Guilty of cooping. Their seclusion in the crew room meant that they not only were off post, but were unable to take any police action because they could not see anything that was going on in the subway station itself. Therefore, each Respondent should be penalized with the loss of 15 vacation days. See Case No. 76117/00 (July 16, 2002) (15 days for tardiness, operating scooter without permission, being off post, failing to monitor radio, and failing to make related Activity Log entries).

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner - Trials



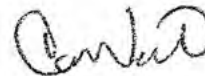
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER CAROL GREENE
TAX REGISTRY NO. 911268
DISCIPLINARY CASE NO. 2011-3650

Respondent's last three annual evaluations were as follows: she received an overall rating of 3.5 "Competent/Highly Competent" in 2012, and a 3.0 "Competent" in 2011 and 2010. [REDACTED]
[REDACTED]
[REDACTED]

Respondent was placed on Level 1 Discipline monitoring from October 2008 to October 2009, for negative performance/behavior. In 2003, she forfeited five vacation days after pleading Guilty to engaging in a physical altercation with another uniformed member of the service.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner Trials

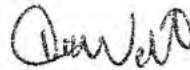
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ELIX HERNANDEZ
TAX REGISTRY NO. 936752
DISCIPLINARY CASE NO. 2011-3651

Respondent's last three annual evaluations were as follows: he received an overall rating of 3.5 "Competent/Highly Competent" in 2012, and a 3.0 "Competent" in 2011 and 2010. [REDACTED]

[REDACTED] He has no prior formal disciplinary record.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner Trials